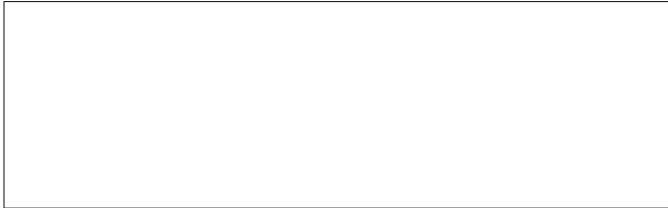




Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

June 9, 2006



Re: [redacted] PBGC Case No. 189580,
Jewelmont Corporation Employee's Pension Plan ("Plan")

Dear [redacted]

The Appeals Board has reviewed the appeal you filed on behalf of your client, [redacted] regarding the PBGC's October 31, 2001 determination of his PBGC benefits under the Plan. For the reasons stated below, we are denying the appeal. We appreciate your patience while the appeal has been pending.

PBGC's Determination and Your Appeal

PBGC determined that [redacted] is entitled to receive \$1,653.48 per month payable as a 100% Joint and Survivor Annuity. PBGC's benefit statement, which was enclosed with its determination letter, showed that the \$1,653.48 amount equaled the "Maximum Guaranteed Benefit" limit ("MGB") for [redacted]

While the MGB is the maximum benefit amount that PBGC is permitted to guarantee under the Employment Retirement Income Security Act (ERISA), in some cases PBGC pays more than the MGB based upon an allocation of the pension plan's assets. The Plan had sufficient assets to pay benefits to [redacted] in excess of the MGB. PBGC determined, however, that [redacted] had waived his entitlement to PBGC benefits above the MGB amount.

PBGC's determination letter also explained that, because [redacted] received estimated monthly payments of \$3,003.33, he had been overpaid \$47,761.90, which PBGC will collect by reducing the \$1,653.48 by \$165.35 per month. Please note that the estimated \$3,003.33 monthly payments have continued while [redacted] appeal has been pending. Although the total overpayment has grown, the \$165.35 monthly pay-back amount will not be increased.

Your December 11, 2001 appeal on behalf of [redacted] asked

that he continue to receive his current level of benefits, or, in the alternative, the amount that he would be entitled to receive in the absence of his benefit waiver. You also sought the voiding of any repayment liability. While you acknowledged that [] signed a waiver of a portion of his benefits, you asserted that it is invalid because he was not provided with sufficient information to understand the impact of the waiver on his benefits. You also contended that the waiver is unenforceable for reason of lack of consideration.

Law, Regulations, and PBGC Policy

PBGC, as the trustee of a terminated pension plan, pays benefits to participants according to the terms of the plan, subject to ERISA's requirements and guarantee limits.

When a plan with insufficient assets terminates, ERISA section 4062(b)(1)(A) gives PBGC a claim against the plan sponsor and its controlled group for the shortfall. Congress defined the amount of this termination liability as the "total amount of the unfunded benefit liabilities (as of the termination date)" - which we refer to in this decision as "UBL." To determine the amount of a pension plan's UBL, the value of the plan's assets is subtracted from the value of its benefit liabilities. ERISA section 4001(a)(18).

PBGC's Plan Termination Regulation permits a "majority owner" to elect to forgo receipt of all or part of his or her benefit. See 29 Code of Federal Regulations ("CFR") section 4041.21(b)(2) (standard termination) and section 4041.47(d) (distress termination). In the case of a corporation, PBGC regulations define a "majority owner" as "an individual who owns, directly or indirectly, 50 percent or more . . . of either the voting stock of a corporation or the value of all of the stock of a corporation." 29 CFR section 4041.2.

In addition, a PBGC Policy - "Assignment and Alienation of Benefits" - permits a majority owner in a PBGC-trusted plan to agree to forgo receipt of all or a portion of his or her termination benefit to reduce the amount of UBL. Such an agreement to forgo receipt of benefits must be in writing, and, if the participant was married on the plan termination date, the participant's spouse must also consent in writing. This PBGC Policy applies to pension plans that were terminated in a distress termination or that were terminated by PBGC. See ERISA sections 4041-42.

The MGB provision, which is found in ERISA section

4022(b)(3), provides that the amount of monthly benefits that PBGC guarantees with respect to a pension plan cannot exceed the actuarial value of \$750 per month in the form of a life annuity commencing at age 65, adjusted for changes in the Social Security contribution and benefit base. The monthly maximum guaranteed benefit for a plan that terminated in 1999 (as was the case with the Plan) is \$3,051.14, if the benefit is paid starting at age 65 in the life annuity form. PBGC's guaranteed benefit regulation, among other things, details how PBGC adjusts the MGB based on the participant's age and the form of the benefit. 29 CFR section 4022.21 - 4022.23.

Background

PBGC's records show that [redacted] In March 1999, Jewelmont filed a Distress Termination Notice with PBGC that sought the termination of the Plan. Jewelmont's distress termination filing alerted PBGC that: (1) the Plan was underfunded, (2) Jewelmont was insolvent, and (3) the company was attempting to liquidate through an asset sale that was scheduled for March 30, 1999. Under a proposed creditor settlement agreement - which had the support of Jewelmont, its secured creditors, and the asset purchaser - unsecured creditors would receive a 20% payout on their claims upon completion of the asset sale. The proposed asset sale was contingent upon 90% of the unsecured creditors agreeing to the 20% payout.

In telephone conversations on March 25 and 29, 1999, PBGC discussed termination of the Plan and PBGC's UBL claim with Jewelmont. In these conversations, Jewelmont was represented by its CFO (Stephen D'Angelo) and by both a benefits attorney [redacted] and an attorney who was representing Jewelmont with respect to the asset sale [redacted]. The possibility that [redacted] would waive his benefits to reduce the Plan's underfunding arose during these discussions. On March 30, 1999, [redacted] sent PBGC a revised Creditor Settlement Agreement, which stated that: (1) Jewelmont proposed to pay PBGC 20% of the Company's good faith estimate of the amount owed to PBGC in exchange for PBGC's release of its claims against Jewelmont and the asset purchaser; and (2) to the extent the claim of PBGC is computed based on waivers of benefits, the release by PBGC of its claims is dependent upon PBGC's receipt of "all necessary waivers consistent with statutes and regulations."

On April 2, 1999, [redacted] executed a Waiver of Pension Benefits and [redacted] executed a Consent to Waiver of Pension Benefits. Both of these documents were signed before a

notary public. [redacted] waiver states in pertinent part:

"I, [redacted]

[redacted] hereby waive and release any and all rights and claims which I may now have, or hereafter acquire, against [the Plan] to receive benefits under the terms of the Plan and/or to receive pension benefits from [PBGC] . . . , but only with respect to that portion of my pension benefits which exceeds the maximum guaranteed benefits as determined under ERISA § 4022 and the regulations issued thereof.

I acknowledge that I have had the opportunity to consult counsel to discuss the effects of this Waiver.

Based upon my full understanding of the effects of this Waiver, I knowingly and voluntarily execute this Waiver."

PBGC received the waiver documents on April 6, 1999, which was also the date that the asset sale of Jewelmont was completed.

Between April 13 and April 16, 1999, PBGC and Jewelmont had discussions concerning possible settlement of the UBL claim. Jewelmont proposed to pay PBGC \$85,000.00, and on April 28, 1999, PBGC accepted this offer. On May 3, 1999, PBGC received payment of the \$85,000 and executed a Satisfaction and Release of Claim with respect to any liability by Jewelmont and/or its asset purchaser for the termination of the Plan.

Effective September 30, 1999, PBGC and Jewelmont entered into an agreement providing that the Plan was terminated and trusteed by PBGC under ERISA § 4042, with a plan termination date (as provided in ERISA § 4048) of April 6, 1999.

Discussion

1. Your assertion that [redacted] was not provided with sufficient information.

Your appeal did not take exception to PBGC's calculation of [redacted] MGB as \$1,653.48 per month.¹ You contended, however,

¹ Your appeal stated that two PBGC actuaries told you how the \$1,653.48 amount was calculated. They explained that the 1999 MGB amount of \$3,051.14 for a life annuity at age 65 was adjusted by (1) increasing it for late retirement, (2) decreasing it for joint and 100% survivor benefit form,

that his waiver of PBGC benefits above his MGB is unenforceable because he was not provided with sufficient information to understand the impact of the waiver on his benefits. Referring to the rules under section 417 of the Internal Revenue Code, you contended that the waiver "is not valid in the absence of at least minimal disclosure."

The requirements of Internal Revenue Code § 417 and the regulations issued pursuant to it, however, are limited to the election and waiver of the Qualified Joint and Survivor Annuity or Qualified Preretirement Survivor Annuity forms of benefits. Accordingly, these requirements do not govern a majority owner's waiver, which is based on a regulation that PBGC issued pursuant to its rulemaking authority under ERISA § 4002(b)(3). We further note that, in the case of [redacted], the [redacted] [redacted] waiver did not alter their benefit form, since they retained the joint and 100% survivor benefit form that they previously had elected.

The [redacted] waiver documents executed by [redacted] and [redacted] were in full compliance with PBGC's regulations and policies. The language in the documents also was clear as to the portion of the benefit that [redacted] and [redacted] were waiving. Furthermore, PBGC's regulation and policies do not provide that a majority owner waiver can be revoked or rendered ineffective based on a lack of sufficient information, or for similar reasons. Accordingly, we found no basis for concluding that the waiver is invalid.

Some courts have held that the waiver of an ERISA claim is unenforceable if the claim is not knowingly and voluntarily released. *Leavitt v. Northwest Bell Telephone Co.*, 921 F.2d 160 (8th Cir. 1990); see also *Morais v. Central Beverage Corp. Union Employees' Supplemental Retirement Plan*, 167 F.3d 709 (1st Cir. 1999). The holdings in *Leavitt* and similar cases, however, involve the common case where an ordinary participant waives a benefit right under ERISA. We believe these cases are distinguishable from the case of [redacted] who as both a majority stockholder of the pension plan sponsor and a plan participant is expressly permitted to waive his ERISA benefits under a specific PBGC regulation.

In any event, the Appeals Board concluded that the record in

taking into account the age difference between [redacted] and [redacted] and (3) decreasing it for the amount of his Plan benefit being paid directly by Travelers Insurance company. The Appeals Board confirmed that these are the adjustments that PBGC had made in determining [redacted] MGB.

this case establishes that [redacted] waiver was knowing and voluntary. [redacted] was [redacted] Jewelmont, which designed, manufactured, and distributed jewelry. Jewelmont was a business of some size, as evidenced by the fact that the Plan had over 100 participants. [redacted] certainly had the general business experience to make an informed decision with respect to the waiver.

The record also indicates that the possibility of the waiver arose in discussions between PBGC and Jewelmont on March 25, 1999, which was more than a week before the waiver documents were signed before a notary public (April 2, 1999). Therefore, it does not appear that [redacted] lacked adequate time to consider the waiver. Moreover, [redacted] clearly had the opportunity to consult counsel; indeed, the waiver document expressly provides that he had "the opportunity to consult counsel to discuss the effects of this Waiver."

You suggested that [redacted] "in essence" was led to believe that he would continue to receive approximately \$3,000 per month in benefits after the waiver, because the unadjusted MGB for a pension plan terminating in 1999 was \$3,051.14.

PBGC did not have any direct contact with [redacted] or [redacted] prior to or at the time when they signed the waiver documents before a notary public. Therefore, PBGC representatives did not have any first-hand knowledge of what information was given to them before the documents were executed. Additionally, while your appeal contains statements as to what [redacted] "presumably" knew and what he "in essence" was led to believe, such statements do not constitute specific evidence with respect to what information had been given to him and [redacted] before they executed the waiver documents.

But even if [redacted] was not presented with specific calculations of his benefits and if he had also assumed that any reductions to his benefits would have been minimal, the Appeals Board concluded that the waiver would be valid. As discussed above, the possibility of the waiver arose during conversations between PBGC and Jewelmont concerning PBGC's UBL claim. It was also clear to the parties that there would be a substantial reduction in PBGC's claims for UBL as a result of the waiver. This should have alerted [redacted] to the possibility that the benefit amount he currently was receiving from the Plan was subject to a significant reduction following plan termination, if he agreed to the waiver. Given [redacted] general business experience and that the waiver document itself states that he had a "full understanding of the effects of this Waiver," the Appeals

Board found that the totality of the circumstances establishes that the waiver was knowing and voluntary.

2. *Your contention that the waiver is unenforceable for lack of consideration.*

Your appeal also asserted that the waiver was invalid for lack of consideration. You stated that PBGC did not have any recourse against [redacted] personally, and that in the absence of such personal claims he waived his benefits in exchange for nothing.²

As discussed above, the waiver documents executed by [redacted] and [redacted] were in full compliance with PBGC's regulations and policies. Furthermore, there is nothing in PBGC's regulations and policies that indicates that consideration is required in order for [redacted] waiver to be enforceable. Because [redacted]'s waiver was in compliance with statutory and regulatory provisions, the defense of lack of consideration - which applies to contractual rather than statutory claims - does not provide a basis to invalidate the waiver.

In any event, the Appeals Board disagreed with your contention that [redacted] benefit waiver was without consideration. By waiving a portion of his benefit in accordance with the majority waiver rules in PBGC's regulation, [redacted] obtained a reduction in the amount of UBL that [redacted] Jewelmont, owed to PBGC under section 4062 of ERISA. This alone establishes that the waiver was supported by consideration.

You further argued that the waiver lacks consideration because (1) there is no apparent connection between it and settlement of PBGC's claims, (2) neither the waiver nor the settlement documents refer to each other, and (3) a space of one month separates their execution. The record, however, clearly establishes a link between the waiver and the settlement. The reduction in PBGC's UBL claim - which had occurred as a direct result of the waiver - clearly was relevant to PBGC's decision to accept Jewelmont's settlement offer. Thus, the waiver and the settlement cannot be viewed as totally independent events, notwithstanding that the settlement documents and the waiver

² You noted that no other shareholder was asked to waive his benefit. PBGC's regulation at 29 C.F.R. § 4041, [redacted]

documents do not specifically refer to each other.

3. *Recoupment of Overpayments*

PBGC has determined that it is authorized to recoup payments that exceed a participant's or beneficiary's entitlement, and it is PBGC's policy to do so. Recoupment is made in accordance with PBGC's regulation 29 CFR section 4022, Subpart E, "PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments." The regulation provides that recoupment will be in the form of future benefit reductions, which are determined actuarially and generally limited to no more than 10 percent of the monthly guaranteed benefit. For [redacted] PBGC's benefit determination letter provided that his future benefits will be reduced by \$165.35 per month, which is 10% of the monthly amount he is entitled to receive from PBGC. The Appeals Board is unable to change PBGC's decision concerning recoupment, since PBGC's proposed reduction is in accordance with its regulation.

Decision

For the reasons stated above, the Board denied your appeal. This is the PBGC's final action in [redacted] case and he may, if he wishes, seek court review of this decision. If you or [redacted] need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,

Charles W. Vernon

Charles W. Vernon
Chair, Appeals Board

cc: [redacted]